Supreme Court of the United States

OCTOBER TERM, 1948

No. 194 Misc.

LEON O. ELLARD,

Petitioner

v.

THE STATE OF NEW HAMPSHIRE,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

RESPONDENT'S BRIEF OPPOSING JURISDICTION

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RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION INCLUDING A STATEMENT OF OBJECTIONS TO THE JURISDICTION

Pursuant to Rule 38, Paragraph 3, Rules of the Supreme Court of the United States, comes now The State of New Hampshire, respondent, by its Attorney-General, and discloses the following material in opposition to the Petition for a Writ of Certiorari, including certain objections to the jurisdiction of the Court as permitted under Rule 7, Paragraph 3 of the said Rules.

Statement of the Case

In the interests of completeness, and mindful of the alert deference accorded to the judgment of the state court under review, the respondent State submits the following:

Leon O. Ellard, age 58, of Salem, New Hampshire, was indicted for embezzlement under Revised Laws of New Hampshire [1942], chapter 450, section 28. This is not a capital offense. The respondent was arraigned and a plea of "Not Guilty" was entered. A jury trial commenced on Thursday, December 11, 1947 at 10:00 A.M. By agreement, one juror was excused on the following Monday. The case was given to a jury of eleven men on Friday, December 19, 1947 at 12:42 P.M. The jury having failed to agree by 11:00 P.M. the jurors were put up for the night at the Exeter Inn and after more than eight hours' rest they continued their deliberations, returning the verdict of "Guilty" at 10:23 A.M., Saturday, December 20, 1947.

The defendant subsequently filed several motions, including one entitled "Motion to Quash and In Arrest of Judgment." The Motion recited in its entirety Article 15th of Part I of the New Hampshire Constitution which reads as follows:

> "No subject shall be held to answer for any crime, or offense, until the same is fully and plainly, substantially and formally described to him; or be compelled to accuse or furnish evidence against himself. And every subject shall have a right to produce all proofs that may be favorable to himself; to meet the witnesses against him face to face, and to be fully heard in his defense, by himself, and counsel. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land."

Using the same language as found in the above Article of the State Constitution, the defendant complained among other things, as more fully set forth in his petition, "that as a subject of said State he was deprived of his immunities and privileges

and put out of the protection of the law in such manner as to deprive him of the judgment of his peers and the law of the land ***."

"Now therefore, the defendant, after verdict of 'guilty' returned by said eleven men respectfully moves as follows:

(1) That said indictment be quashed as insufficient upon which to support verdict and sentence;

(2) That sentence be arrested and deferred until such time as the constitutional rights of the defendant have been finally determined or if an appeal be prosecuted by the defendant, then until further order of this Court."

The course of events following the trial is best described in the findings and rulings on the Motion filed by the Trial Justice on December 30, 1948, which so far as pertinent to the issue reads as follows:

"Findings and Rulings on Motions Filed after Verdict."

"After the verdict of guilty was returned by the jury in this case, numerous motions and affidavits were filed by defendant's counsel. Defendant requested the right to produce evidence in support of his motions. The Court heard counsel and certain witnesses on the 29th day of December, 1947, and upon defendant's request continued the hearing until January 21, 1948 at which time he was given full opportunity to produce evidence, except for the proposed interrogation of jurors as appears in the record, and he did produce further evidence in support of said motions.

"The defendant requested the Court to make findings of fact on his motion to set aside the verdict because the trial had proceeded to a conclusion with eleven jurymen.

"The Court finds the following facts:

"Trial commenced Thursday, December 11, 1947. Before Court opened on Monday, December 15, 1947, the Court was informed that the wife of Dennis Driscoll, one of the jurymen, had died earlier in the morning. Although Mr. Driscoll was then at the Courthouse, he was in no condito proceed with his duties. William H. Sleeper, counsel for

the defendant, and the County Solicitor were called into chambers and informed of the facts. Both consented to proceed with eleven jurors. Shortly thereafter Court was opened and after the eleven jurymen had been seated and the defendant was seated with his attorney, Mr. Sleeper, the Court called the stenographer, counsel for the State, and William H. Sleeper, Esq., to the bench: 'Court: The Court has been informed that the wife of Dennis Driscoll, one of the jurors serving in this case, died this morning and upon agreement of counsel, both for the State and counsel for the defendant the trial is to proceed with eleven jurors,' Mr. Sleeper said: 'Yes, our client agrees to that, defendant agrees to it.'

"The trial continued to its conclusion with eleven jurors with the consent of State's counsel, by sanction of the Court, and upon the intelligent consent of the defendant, Leon O. Ellard, expressed through his counsel, William H. Sleeper.

* * * * *

"It is further found that there is no probability that on a new trial a different verdict will be rendered."

Upon appeal to the Supreme Court of the State of New Hampshire, 95 N. H.—, 60 A. 2nd 461, dec'd. July 6, 1948, the Court prefaced its opinion by this statement of facts:

"It appears that five days before the end of the trial one of the jurors became incapacitated by reason of the death of his wife and all the attorneys involved agreed, with the sanction of the Court and with the knowledge and without objection by the respondent who was informed of the situation by his lawyer, to go on with eleven men. After a verdict of guilty was returned the defendant for the first time objected to this arrangement and moved to quash and in arrest of judgment, among other grounds, because the agreement to go on with eleven men was made without his knowledge or consent. To the denial of this motion and the Court's findings on the matter exceptions were taken. ***"

The language of their opinion further clarifies the facts as follows:

"The accused vigorously maintains that his constitutional rights were invaded because the case was tried in part and the verdict rendered by an eleven man jury. However, the Trial Justice found that the respondent with the Court's sanction and by agreement of his counsel and the solicitor 'intelligently' waived his right to a twelve man jury. The law is plain in this State, and we believe by the better authority elsewhere, that this may be done. In *State* v. *Almy*, 67 N.H. 274, 280, 28 A. 372, 22 L.R.A. 744 it was held that a party may waive a constitutional right provided for his benefit. See also *Patton* v. *United States*, 281 U.S. 276, 50 S. Ct. 253, 74 L. Ed. 854, 70 A.L.R. 263; *Adams* v. *United States*, 317, U.S. 269, 277, 63 S. Ct. 236, 87 L. Ed. 268, 143 A.L.R. 435; *People* v. *Rabin*, 317 Mich. 654, 27 N.W. 2d 126, 130, and cases cited; *Annotations* 70 A.L.R. 279; 105 A.L.R. 114. The question before us, therefore, is whether the Trial Court's findings can be supported by the evidence. The record discloses that the accused had the assistance not only of a skillful lawyer with years of practice but, that he was a mature, experienced and at least normally intelligent man in his own right. He admittedly noticed the absence of the twelfth juryman on the morning in question and mentioned this to his counsel sitting beside him, who, he says told him that he had agreed in chambers to go on with eleven men. Thereafter his lawyer in the respondent's presence, though the latter does not admit he heard what was said, went to the Court and told the Court relative to this agreement 'Yes, our client agrees to that. Defendant agrees to it.' This occurred on a Monday morning and the trial went on without objection by anyone until after the jury brought in a verdict of guilty. While the better practice, and the one which should be followed in the future, would have been for the Court to interrogate the respondent and obtain a waiver from him personally, no error appears in the procedure followed under the facts existing here. It seems that the defendant, having taken his chances on being acquitted by eleven men and lost, now seeks to try again. The Presiding Justice has found upon sufficient evidence that he should not be allowed to do so and his findings are sustained."

ARGUMENT

Summary

"The issue is not whether an infraction of one of the specific provisions of the first eight Amendments is disclosed by the record. The relevant question is whether the criminal proceedings which resulted in conviction deprived the accused of the due process of law to which the United States Constitution entitled him." Frankfurter, J. concurring in *Adamson* v. *California*, 332 U.S. 46, 67, 91 L. Ed. 1903, 1917, 67 S. Ct. 1672, 1683 (1947). In order to bring himself within the protection of the Constitution it is incumbent upon the accused to prove: first, that the privilege of a trial by a jury of twelve in non-capital cases is guaranteed by the Federal Constitution against impairment by the States and if so guaranteed was denied by the proceedings in this case; and, second, that his agreement, as expressed by counsel, did not waive his right to a trial by a jury of twelve men.

The accused, who makes these claims has the burden of establishing the prohibition of power to the states as it relates to this privilege and waiver. *Cf., Bute* v. *Illinois*, 333 U.S. 640, 92 L. Ed. (Adv. Sheets) 735, 68 S. Ct. 763 (1948). He has failed to prove either the privilege, or, if it exists, that it was violated and may not be waived in the state courts.

1. The Federal Constitution does not guarantee the right to a trial by a jury of twelve in the state courts; but such a right, if it existed, was not denied by the proceeding in the case at bar.

Trial by jury in criminal cases is specifically mentioned twice in our Federal Constitution. Article III, Section 2, provides that "The Trial of all Crimes, except in Cases of Impeachment, shall be by jury; ***" This clause applies only to trials held in the Federal Courts and this Court has seen "very clearly that this provision was not intended to be applied to trials in

the state courts." *Eilenbecker* v. *District Court*, 134 U.S. 31, 35, 33 L. Ed. 801, 803, 10 S. Ct. 424, 425 (1890). The Sixth Amendment provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, ***." This, too, applies only to trials in Federal Courts and is not a limitation upon the powers of the states. *Barron* v. *Baltimore*, 7 Pet. 243, 8 L. Ed. 672, (1833); *West* v. *Louisiana*, 194 U.S. 258, 262, 48 L. Ed. 965, 969, 24 S. Ct. 650, 652 (1903); *Maxwell* v. *Dow*, 176 U.S. 581, 586, 44 L. Ed. 597, 599, 20 S. Ct. 448, 451 (1899); *Betts* v. *Brady*, 316 U.S. 455, 461, 86 L. Ed. 1595, 1601, 62 S. Ct. 1252, 1256 (1942).

The accused contends, however, that while no other specific mention of trial by jury in criminal cases is found in the Federal Constitution, it is encompassed by the phrase "due process of law" in the Fourteenth Amendment. From this he argues that it is a right protected against the power of the state.

The fact that the privilege of jury trial is included in the Federal Bill of Rights does not *per se* make it an essential element of due process. It is *due* process, rather than *federal* process which is required by the Fourteenth Amendment. *Bute* v. *Illinois*, *supra*, 92 L. Ed. at page 739. For more than seventy years the Supreme Court has consistently rejected "the belief that the Fourteenth Amendment was a shorthand summary of the first eight Amendments theretofore limiting only the Federal Government, and that due process incorporated those eight Amendments as restrictions upon the powers of the States." Frankfurter, J., *Adamson* v. *California*, *supra*, 332 U.S. at page 62. "There is no such general rule." *Palko* v. *Connecticut*, 302 U.S. 319, 323, 82 L. Ed. 288, 291, 58 S. Ct. 149, 151 (1937). Of course, "it is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. *** If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such nature

that they are included in the conception of due process of law." *Twining* v. *New Jersey, supra,* 211 U.S. at page 99.

The procedure followed and permitted here by the courts of New Hampshire "should not be held to violate the standard of permissible process of law broadly recognized by the Fourteenth Amendment unless it violates 'the very essence of a scheme of ordered liberty'." and unless it would " 'violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " *Bute* v. *Illinois, supra,* 92 L. Ed. at page 744 and cases cited. The petitioner has not cited nor has diligent search revealed any decision which holds that the privilege of a trial by a jury of twelve in a non-capital case is the very essence of a scheme of ordered liberty. On the contrary, it has been said that few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without a trial by jury. *Palko* v. *Connecticut, supra,* 302 U.S. at page 325. The short answer to the suggestion that this provision of the Fourteenth Amendment was a way of saying that every State must have trial by a jury of twelve in criminal cases, is that it is a strange way of saying it. Frankfurter, J., *Adamson* v. *California, supra,* 332 U.S. at page 63.

In this case, moreover, the State of New Hampshire does not admit that the accused was denied the right to a jury trial. The facts dispute such a denial. The right to a fair trial is recognized by the New Hampshire Constitution which says that "*** no subject shall be arrested, imprisoned, despoiled or deprived of his property, immunities or privileges, put out of protection of the law, exiled or deprived of his life, liberty or estate, but by the judgment of his peers or the law of the land," and the legislature is forbidden to pass any law which would subject a person to capital punishment without a trial by jury. *N.H. Constitution, Part I, Articles 15th and 16th.*

In this case, twelve jurors were chosen. After two days of trial, one juror could not continue with his duties. For the last five days of the evidence, eleven jurors were in the box. It was only after the defendant had consented to this change, that the

court permitted the trial to continue. The right existed; it was waived—not denied. The waiver recognized the existence of the right and that he could not be deprived of that right unless he intelligently gave his consent.

II. In the case at Bar, there is a valid waiver of the privilege of trial by a jury of twelve.

The question raised by the defendant's "Motion to Quash and In Arrest of Judgment" and the one which concerned the Supreme Court of New Hampshire was whether or not, in the circumstances of this case, the defendant could and did in fact validly waive the constitutional rights of a jury trial to which he may have been entitled under Article 15th, Part I, of the New Hampshire Constitution. The conclusion, however, that the defendant not only had the right to waive a jury of twelve, but effectively exercised the waiver, is based largely upon the decision of the United States Supreme Court in *Patton* v. *United States*, 281 U.S. 276, 74 L. Ed. 854, 50 S. Ct. 253, (1930).

It was the opinion of this Court in the *Patton* case that defendants on trial in the Federal Courts upon an indictment alleging a conspiracy to bribe a Federal Prohibition Agent, could consent to the trial proceeding to a finality with eleven jurors, when the twelfth had become incapacitated during the course of the trial, and thus waive the right to a trial and verdict by a constitutional jury of twelve men. The Court was of the opinion that trial by jury in criminal cases had never been considered as a part of the structure of government, but was, on the contrary, uniformly regarded as a valuable privilege of the accused. The language of the Sixth Amendment which "reflected" the meaning of Article 3, s. 2, also relating to trial by jury, clearly deals with the subject in terms of a privilege. To deny his power to waive the right was to convert a privilege into an imperative requirement. It was the opinion of this Court that the trial court had authority *in the exercise of a sound discretion* to accept the waiver and to proceed to trial and determination of the case with a reduced number, or even without a jury. Difficult to refute is the

logic that a public policy which permits the accused to dispense with *every* form of trial by a plea of guilty cannot consistently forbid him to dispense with a *particular* form of trial by consent.

Similarly, the decisions in New Hampshire have long regarded the constitutional right to a twelve man jury as a private right of the subject, and not a public right of the state, and a party may waive a constitutional as well as a statutory provision made for his benefit. In short, he may exercise it or waive it as he deems expedient. *State* v. *Almy,* 67 N.H. 274, 280 *et seq,* 28 Atl 372, 375 (1892), *Wooster* v. *Plymouth,* 62 N.H. 193, 196.

Several reasons have been suggested why a defendant might wish to consent to the continuance of a trial with less than twelve men in the jury. Possibly, because his witnesses were then present, and he might not be able to get them again, or he thought it was best to be tried by the jury as thus constituted. As said by the State Court in this case, "It seems that the defendant, having taken his chances on being acquitted by eleven men and lost, now seeks to try again. The Presiding Justice has found upon sufficient evidence that he should not be allowed to do so and his findings are sustained."

Whatever purpose the accused may have had in giving consent through his competent counsel and in withholding his objection until after the verdict, it is submitted that "we must look at the substance of the thing; and that is, that if he knows of an objection to the panel before the verdict is rendered, and in time to prevent the verdict, and obtain a rehearing before another jury, and does not avail himself of the opportunity, he must be holden to a waiver of the objection. Otherwise, he would be permitted to lie by and speculate upon the chances of a verdict, and that cannot be tolerated." *State* v. *Tuller,* 34 Conn. 280, 295.

Considering the "substance" or the "totality of the facts" in the case at bar, the accused is a man 58 years of age, of at least average intellect, not inexperienced in the ways of criminal law relating to matters of embezzlement as indicated by facts stated in motions made by his counsel, and possessing adequate education and training to fill a responsible position in a state agency. He was represented by competent counsel with years of exper-

ience in the law of New Hampshire, and the manner in which the trial progressed was fair to a degree which led the Presiding Justice to conclude as a general finding of fact "that there is no probability that on a new trial a different verdict will be rendered."

Nor is there any basis in fact or law that this particular individual was not accorded the same privileges and immunities as another person would have enjoyed in a similar case. Indeed, if the accused had wished to continue with eleven jurors and if he had been denied the right of waiving the privilege—always considered as personal to the accused—the argument that he would then have been denied the privileges and immunities to which he was entitled would have more force than in the case at Bar. However, the petitioner cites New Hampshire Revised Laws, chapter 428, section 15, which provides that the defendant in a non-capital criminal case, such as this, could have waived the right to a trial by jury in writing when called upon to plead or before the jury was impaneled. The statute is obviously immaterial to the facts in the present case, where the waiver took place after the jury was impanelled. This undoubtedly accounts for the fact that the statute has never been cited or discussed in pleadings nor in argument in this case prior to the filing of the petitioner's brief. The reason for a written waiver being filed before a jury is impaneled is obvious. While the Superior Court is one of record, stenographic verbatim reports of the proceedings are not always noted upon the arraignment nor while the jurors are being drawn. Once the trial before a jury is commenced, a stenographer is present and a waiver of this kind, in open court, then becomes a part of the record. When the stenographer noted the remark of counsel at the bench, "Yes our *client* agrees to that. *Defendant* agrees to it," the circumstances were such that the court stenographer was in fact acting merely as an amanuensis.

The decision in *Maxwell* v. *Dow, supra,* 176 U.S. 581, would seem to be conclusive on the question of privileges and immunities. True, in that case, this Court considered the validity of a statute providing for a criminal trial by a jury of eight, but the principles quoted in the petitioner's brief (at page 13), show that

there is no violation "if all persons within the state are made liable to be proceeded against in the same way." There is no evidence in the case at bar that he was denied the statutory right to waive in writing at the time he entered his plea or before the jury was impaneled. Nor is there any evidence that another person in a similar case has ever enjoyed a greater privilege or immunity with respect to waiver after the trial has commenced.

III. Objections to the Jurisdiction to Grant the Writ of Certiorari

The State contends that the petitioner is not entitled to an issuance of the writ as a matter of right, and that since he has failed to show a substantial federal question it should not be issued as a matter of discretion.

It is generally held that the question must appear affirmatively upon the face of the record. Specifically, the petitioner alleges that the State Court's rulings on his Motion to Quash and In Arrest of Judgment "were such as to bring the case within the jurisdiction of this Court as a violation of his rights, privileges and immunities under Amendments to the Constitution of the United States, Article 14, Sec. 1.***" The motion itself, however, appears in the Record (P.), and is quoted at length in the Statement of the Case, *supra,* P. 2, and one looks in vain for any mention of the Federal Constitution. On the contrary, after quoting in its entirety the applicable section of the *State* Constitution, the petitioner alleged that his "constitutional" rights had not been observed. Nor is there any part of the opinion in the State Court where it appears affirmatively that the Federal Constitution was considered and questions so raised, decided.

However, if it be assumed *arguendo,* that the necessary implication of the decision so far as it relates to waiver, is to raise and decide a question under the Federal Constitution, the reasoning of the opinion is based upon fundamental concepts stated previously by decisions of this Court and widely recognized in other jurisdictions. *State* v. *Almy,* 67 N.H. 274, 280, 28 A. 372, 22 L.R.A. 744; (1892) *Patton* v. *United States, supra,* 281 U.S.

276; *Adams* v. *United States*, 317 U.S. 269, 277, 87 L. Ed. 268 (1942); *People* v. *Rabin*, 317 Mich. 654, 27 N.W. 2d. 126, 130, (1947) and cases cited; Annotations, 70 A.L.R. 279; 105 A.L.R. 1114.

For the reasons above stated, it is respectfully submitted by the respondent State of New Hampshire that the petition for a writ of *certiorari* should be denied and that the writ should not issue.

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